SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-987

ROY W. WEATHERS,

Petitioner,

v.

PAUL EBERT, Commonwealth Attorney of Prince William County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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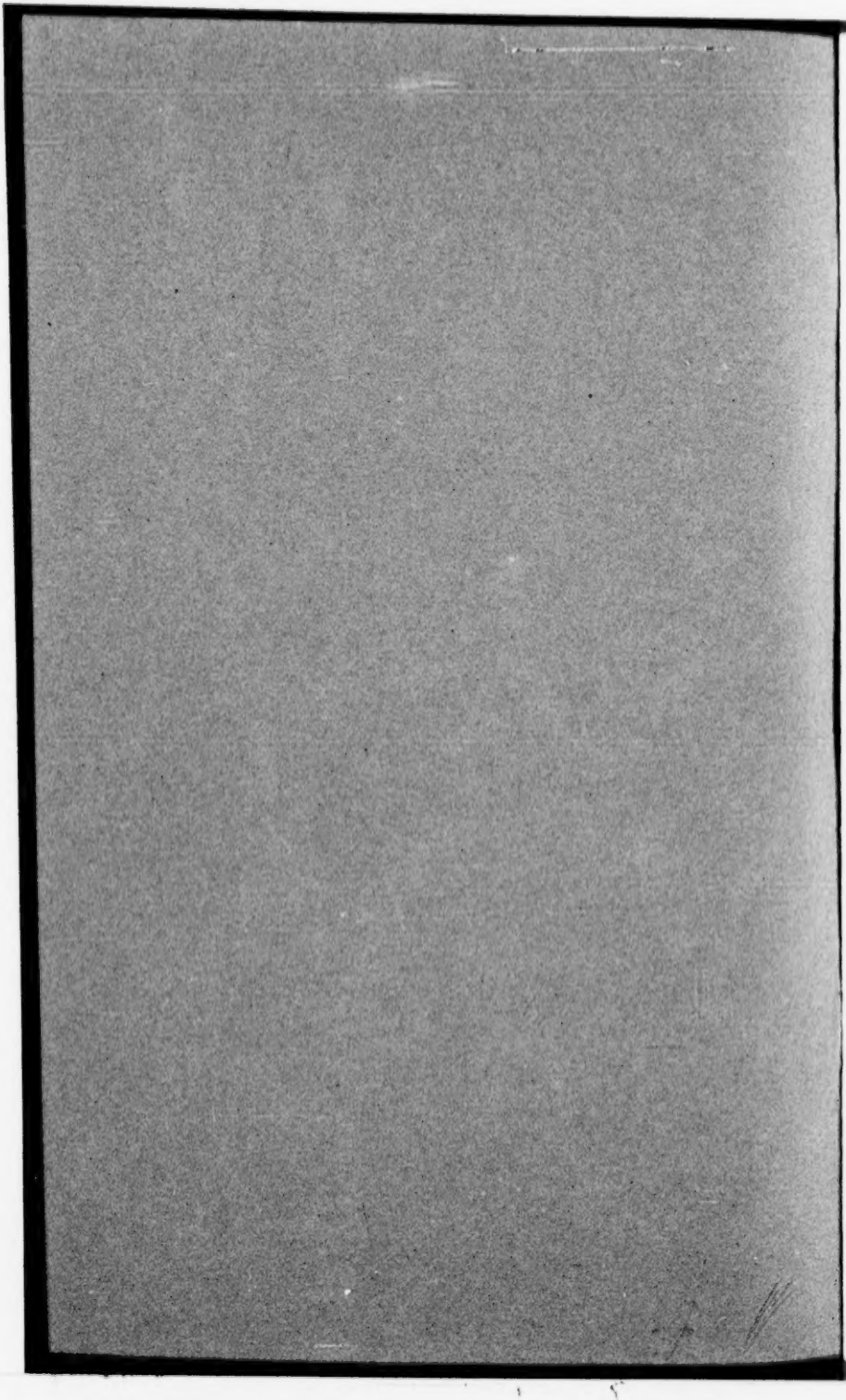
March 5, 1975

ABE DUPLICATORS, INC.—1730 Rhode Island Ave., N.W.—Washington, D.C.—223-6160



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The respondent Paul Ebert, Commonwealth Attorney of Prince William County, Virginia, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 505 F.2d 514.

Thus petitioner was indicted for distinct offenses patently committed on different days.

(b) The record in this case, including petitioner's complaint below, is barren of any indication that the petitioner at any time raised a double jeopardy objection or defense to the second indictment, or that the second indictment was nolle prosequied on double jeopardy grounds. The order of the Circuit Court of Prince William County, dated May 10, 1973, supplied by the petitioner for the Fourth Circuit's convenience, states:

> "This day came the Attorney for the Commonwealth in open court and with the consent of the Court, saith that he will not prosecute further on behalf of the Commonwealth against the said Roy W. Weathers, and a nolle prosequi is hearby entered accordingly with objection of the defendant and his counsel. And the defendant is released as to this charge."

(c) While petitioner's complaint alleged (par. 13) that he "was brought to trial . . . on the second indictment, number 3836," on the day when the nolle prosequi was entered, the aforesaid court order indicates that the nolle prosequi was entered immediately after "the Court Reporter was sworn," but before any jury was empanelled or any witness was sworn. Thus no jeopardy could have attached with respect to this second indictment, it being the law of Virginia, as elsewhere, that "the danger of conviction or jeopardy of an accused begins when the [non-jury] trial has reached the stage where the Commonwealth begins to introduce its testimony" or at the stage of "the swearing of the jury when the accused is tried by jury." *Rosser v. Commonwealth,* 159 Va. 1028, 1036.

Thus missing from this case is the essential factual predicate of the Question Presented — *i.e.*, allegations or facts demonstrating that petitioner's constitutional protection against double jeopardy was somehow violated by the prosecutor's actions. No kind of evidentiary hearing can fill the void created by the facts and allegations already supplied by the petitioner. Compare *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974), certiorari granted (No. 74-5435, February 24, 1975), where the essential factual predicate to the issue as to the extent of a prosecutor's immunity — the alleged knowing use of perjured testimony to secure conviction — was amply alleged and buttressed by judicial findings.[3]

Without some assurance from the record, including the allegations in the complaint, that petitioner was in fact put in double jeopardy by the prosecutor's actions, the Question Presented is left hanging from a hypothetical situation. In the context of this record, which conclusively shows that the petitioner was never put in double jeopardy, the Question Presented in the petition could be resolved only by rendering an impermissible advisory opinion.

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[3] Likewise, in *Hilliard v. Williams*, 465 F.2d 1212, 1213-1214 (6th Cir. 1972), certiorari denied, 409 U.S. 1029 (1972), a case much relied upon by petitioner, there were judicial findings supporting the factual predicate of the immunity question, i.e., the allegation that the prosecutor had deliberately suppressed an FBI report establishing the defendant's innocence.

2. *Absent a ruling by the Fourth Circuit as to the extent of a prosecutor's immunity, no reason exists for the for the grant of certiorari.*

As has been made evident herein, the Fourth Circuit did not, in the words of the petition (p. 5), confer "absolute immunity upon a prosecutor who was alleged to have intentionally violated petitioner's constitutional rights." That court, in Part I of its opinion, simply held that the averments in the complaint were too broad or otherwise too inadequate to warrant consideration of whether the prosecutor's traditional immunity should be lifted in this instance.[4] Being a decision limited to the unique pleading matters here present, it does not qualify for review by this Court.

It follows that the claimed conflict (Pet., p. 5) with *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), cert. denied, 409 U.S. 1029 (1972), and with *Scheuer v. Rhodes*, 416 U.S. 232 (1974), does not and cannot exist. The Fourth Circuit did not disagree with the Sixth Circuit's *Hilliard* ruling; it found that case to be "inapplicable" since the "facts set forth in this complaint do not approach the specific allegations of deliberate malfeasance which led

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[4] The petitioner seeks to buttress his allegations concerning the double jeopardy matter by referring (Pet., p. 9) to assertions in another part of the complaint concerning the alleged concert of action in securing an illegal arrest and confinement of the petitioner. But the latter element, dealt with in Part II of the opinion below, is in no way related to the adequacy of the double jeopardy allegations.

the court in *Hilliard* to depart from the traditional rule of immunity" (Pet. 7a).

And this Court's ruling in the *Scheuer* case, which dealt only with the extent of the executive immunity, in no way conflicts with the failure of the Fourth Circuit to remand this case for an evidentiary hearing. This Court ordered such a hearing in *Scheuer*, 416 U.S. at 250, only because the documents "properly before the District Court at this early pleading stage specifically placed in issue" whether the executive officers were acting within the scope of their duties and were acting in good faith, in the light of the demonstrated events on the Kent State campus. But here the pleadings and documents put before the Fourth Circuit clearly show that petitioner's double jeopardy rights were not and could not have been violated. An evidentiary hearing would only serve to underscore that self-evident fact. And it would be equally useless to remand this case to shore up the generalized assertions of abuse of authority or malfeasance that become viable only if the prosecutor did in fact place the petitioner in double jeopardy.

Finally, this Court's recent action in granting certiorari in *Imbler v. Pachtman*, No. 74-5435 (February 24, 1975), does not add to the reviewability of this case. Nor does it warrant a holding of this petition until the *Imbler* case is argued and decided next Term. Whatever this Court may hold in *Imbler* as to the scope of the prosecutor's immunity, the ruling can have no impact on the correctness or reviewability of the decision below. To repeat, the Fourth Circuit has not found it necessary here to delineate, expand or contract the prosecutor's traditional immunity. The faulty pleadings and the inhospitable record made such action inappropriate.

The petitioner has sought to ascribe to the Fourth Circuit the view that the prosecutor's immunity is "absolute." But that court has never adopted that notion. In a decision understandably not cited in the petition, *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972), the Fourth Circuit has recognized that absolute immunity does not extend to prosecuting attorneys when acting outside their judicial or quasi-judicial discretion. The instant case is not to the contrary, for the matter was not put in issue. It affords no opportunity whatever to explore the Fourth Circuit's views in that regard.

This is a simple case of faulty pleading and of a record that fails to sustain any alleged invasion of petitioner's constitutional rights. Its very uniqueness precludes review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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